No. 78-1379

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAHOE NUGGET, INC., dba JIM KELLEY'S TAHOE NUGGET, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 584 F. 2d 293. The decisions and orders of the Board (Suppl. App. 1-89) are reported at 227 N.L.R.B. 357 and 227 N.L.R.B. 368.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. 29-30). On January 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 10, 1979. The petition was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

STATEMENT

1. Petitioner Tahoe Nugget operates a bar, restaurant, and casino in Crystal Bay, Nevada (Suppl. App. 13). Petitioner Nevada Lodge operates a restaurant, hotel, and

casino in the same area (Suppl. App. 48).[1] Prior to 1974, petitioners were members of the Reno Employers Council (the "Association"), an association of employers engaged in casino, restaurant, and related businesses. The Association represents its members in collective bargaining with various unions, including the Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (Suppl. App. 13-14, 48-49). When Tahoe Nugget and Nevada Lodge joined the Association (in 1962 and 1960 respectively) they became parties to the existing Union-Association contract. In doing so, they recognized the Union as the representative of their bar and culinary employees (Suppl. App. 14, 50).

In September 1974, petitioners announced their timely withdrawal from membership in the Association (Suppl. App. 14, 50). Thereafter, petitioners refused the Union's request to enter into bargaining on an individual basis. Petitioners claimed that they had a genuine doubt that the Union represented an uncoerced majority of their employees (Suppl. App. 2, 59).

2. Unfair labor practice charges were then filed by the Union. The Board concluded that the petitioners had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis (Suppl. App. 5, 43, 78).[2]

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[1]The court of appeals consolidated the two unfair labor practice proceedings involving the petitioners (*Tahoe Nugget, Inc.*, Suppl. App. 1-42; *Nevada Lodge*, Suppl. App. 43-89) for argument and decision.

[2]The Board also found that Nevada Lodge violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee working conditions following their withdrawal from the Association and also violated Section 8(a)(1) by announcing and granting pay increases in order to induce employees to abandon support of the Union (Suppl. App. 5, 81, 83).

The Board noted that an employer may not lawfully join a multi-employer bargaining unit unless a majority of his employees desire to be represented by the union that has been recognized for the multi-employer unit. Accordingly, there is a presumption that, at the time an employer joins a multi-employer unit and adopts its contract, the union has the majority support of that employer's employees (Suppl. App. 2-3). This presumption continues, not only while the employer remains in the multi-employer unit, but also after he withdraws from the unit and reverts to single-employer status (Suppl. App. 2).[3] In light of this presumption, the Board concluded that it was necessary for the employers in this case to "show either that the [U]nion in fact no longer enjoys majority status or that [their] refusal to bargain was predicated on a reasonably grounded doubt as to the [U]nion's continued majority status" (Suppl. App. 4). The Board then reviewed the findings of the Administrative Law Judge and concluded that petitioners had failed to make either showing (Suppl. App. 5).[4] The Board ordered

[3]The Board noted (Suppl. App. 3) that petitioners may not now claim that the Union lacked "majority status among [their] employees in the single-employer unit[s] [at the time] when recognition was originally extended" because, under the "decision in [*Local Lodge No. 1424, I.A.M.* v. *NLRB*, 362 U.S. 411 (1960)], * * * [an employer] may not defend against a refusal-to-bargain allegation on the ground that original recognition, occurring more than 6 months before charges had been filed in the [unfair labor practice] proceeding raising the issue, was unlawful." Under the decision in *Local Lodge No. 1424, I.A.M.* v. *NLRB*, 362 U.S. 411 (1960), any "such defense is barred by Section 10(b) of the Act" (Suppl. App. 3).

[4]Neither employer introduced evidence such as an employee vote to prove that the Union in fact no longer enjoyed majority support. Both sought to show that they had a reasonably based good-faith doubt as to the Union's continued majority status.

In asserting its doubt as to the Union's majority support, Tahoe Nugget relied upon a "rumor concerning low Union membership and dues payment" in the Reno area, rumors and articles concerning Union organizing efforts and alleged financial difficulties, Union

petitioners to recognize and bargain in good faith with the Union (Suppl. App. 5, 39, 43-44, 87).[5]

3. The court of appeals upheld the Board's decision and enforced its orders. The court agreed with the Board that the presumption that the Union represents the majority of the employees remains applicable to the

inactivity in representing employees, high turnover of unit employees, and reports of employee expressions of dissatisfaction with the Union. The Administrative Law Judge, "considering all of [these] factors," concluded that Tahoe Nugget "did not have substantial and reasonable grounds for believing the Union had lost its majority status" (Suppl. App. 36). He pointed out that the membership rumor was not "keyed to union membership * * * among [Tahoe Nugget's] employees. In Addition, * * * a lack of employee membership cannot be equated to a lack of desire of employees for union representation" (Suppl. App. 32-33). The Administrative Law Judge also noted that "a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has" (Suppl. App. 33). Concerning the contention that the Union had filed no grievances during 1974, the Administrative Law Judge noted that "there is no showing that the filing of grievances was warranted, and there is no showing that the Union failed to actively represent the employees in the past" (*ibid.*). He also explained that the employer's reliance on turnover to support a doubt of majority status is ineffective because, under Board precedent, new employees are presumed to support the union in the same ratio as the old (Suppl. App. 34). Finally, the Administrative Law Judge noted that Tahoe Nugget's representations concerning employee dissatisfaction with the Union involved only three named employees (one of whom was not a member of the unit) out of the 35 to 52 unit employees, as well as "bits and pieces of overheard conversations by an undisclosed number of other employees * * *" (Suppl. App. 35).

Nevada Lodge also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity, and employee expressions of dissatisfaction with the Union (Suppl. App. 71-77). As to the latter, the Administrative Law Judge noted: "Six out of the 165 or more employees in the * * * unit expressed displeasure with the Union to [the general manager]. * * *[Nevada Lodge] could not base a reasonable doubt of majority on such a limited number of remarks" (Suppl. App. 75).

[5]Petitioner Nevada Lodge was also ordered to desist from granting unilateral wage increases (Suppl. App. 86).

individual employer units upon their withdrawal from the multi-employer unit.[6] The court explained (Pet. App. 17-18); footnote omitted):

> When [petitioners] joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violated the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation.

Turning to the Companies' contention that they possessed a good-faith doubt of the Union's continuing majority support, the court found the evidence of employee dissatisfaction to be "unreliable and the inference from it tenuous" (Pet. App. 23). The court observed that the showing of Union inactivity was "de minimis" (Pet. App. 25-26). The court also noted that "[t]here was no evidence here of employee-led challenges to the Union's representation or of abdication by the Union" (Pet. App. 27). Finally, assessing the

[6]The court also agreed (Pet. App. 6-7) with the Board that the petitioners' contention that the Union had not enjoyed majority support among their employees at the time they joined the Association was timed-barred by Section 10(b) of the Act. See note 3, *supra*.

"[c]umulative [e]ffect of the [e]vidence," the court concluded (Pet. App. 28):

> None of the evidence is wholly referable to a decline in Union support within the relevant units. Most of the evidence indicates the Union had equivocal support in the Lake Tahoe area. Some of the evidence is subjective; the inferences of loss of Union support are ambiguous. Before unilaterally disrupting the bargaining relationship, an employer must obtain more reliable evidence of lost support.

ARGUMENT

Petitioners do not dispute the settled proposition that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, this presumption is irrebutable for a year and thereafter is rebutted only if the employer shows "that the union was [in fact] in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal [to bargain]" (Pet. App. 4-5). See, *e.g.*, *NLRB* v. *Vegas Vic, Inc.*, 546 F. 2d 828, 829 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977); *NLRB* v. *Dayton Motels, Inc.*, 474 F. 2d 328, 332 (6th Cir. 1973). Instead, petitioners contend that this presumption should not survive an employer's withdrawal from a multi-employer bargaining unit, and that, in any event, they were entitled to rebut the presumption by showing that the Union did not enjoy majority support at the time voluntary recognition was accorded. Petitioners also claim that the Board and the court of appeals erred by refusing to consider the cumulative weight of the individual factors asserted as establishing a good-faith doubt of continued majority representation. There is no merit to these contentions.

1. Petitioners claim (Pet. 6, 16-19) that, in conflict with *NLRB* v. *Richard W. Kaase Co.*, 346 F. 2d 24 (6th

Cir. 1965), the presumption of continuing majority status in the individual units has been improperly derived from the Union's status as representative for the multi-employer unit. However, neither the Board nor the court of appeals relied on the reasoning that petitioners challenge.

Instead, both the Board (Suppl. App. 2-3) and the court (Pet. App. 15-19) emphasized that the presumption that the Union represented a majority of each individual unit flowed, not from the fact that the Union had majority support in the multi-employer unit, but from the fact that petitioners had voluntarily recognized the Union as representative of their employees at the time they joined the multi-employer group. The court of appeals expressly distinguished this case from the situation in *NLRB* v. *Richard W. Kaase Co., supra.* In *Kaase Co.*, as the court below pointed out (Pet. App. 17 n.36): "[T]he union's position as exclusive bargaining representative of the Kaase employees originated with an election in the multi-employer unit. No evidence showed the Kaase employees themselves ever favored the union; thus, the fact of majority status in the single-employer unit had never been established, as it had been here by the employer's voluntary recognition."[7] There is thus no conflict among the circuits warranting further review in this case.

2.a. The Board and the court of appeals correctly concluded that petitioners' attempt to rebut the presumption of continuing majority status by showing that the Union did not enjoy majority status when it was first recognized by petitioners (in 1960 and 1962) was barred by the six-month limitations period in Section 10(b) of the Act, 29 U.S.C. 160(b). See notes 3 & 6, *supra.* In *Local Lodge No. 1424, supra,* 362 U.S. at 416, the Court noted that "[i]t is doubtless true that §10 (b) does not

[7]In a multi-employer election, the union must receive a majority of the votes of the participating unit employees, but does not have to secure a majority from the employees of any individual employer.

prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge." The Court held that (*id.* at 416-417; footnote omitted):

> [I]n applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10 (b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10 (b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Applying these principles in *Local Lodge No. 1424,* the Court concluded that the Board could not base a finding that a contract is unlawful upon the fact that, at the time the contract was executed, the Union lacked majority support when the contract had been signed more than six months before the Section 10(b) charge was filed. The unlawful time-barred event could not be used "to cloak with illegality that which was otherwise lawful." 362 U.S. at 417.

Similarly, to permit petitioners in this case to challenge the presumption of continued lawful bargaining relations

with the Union by delving into events that transpired more than a decade previously, in order to establish that the Union lacked majority status when it was first recognized, would serve "to cloak with illegality that which was otherwise lawful" in violation of the purposes of Section 10(b). Thus, as the court of appeals observed (Pet. App. 7), evidence that an unfair labor practice occurred more than six months before the Section 10(b) charge is filed cannot, by itself, be invoked as a defense to a refusal to bargain charge. See *Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council* v. *NLRB*, 415 F. 2d 656, 659 n.7 (9th Cir. 1969).

b. Contrary to petitioners' contention (Pet. 8-9), the decision of the court of appeals on this issue is not in conflict with *NLRB* v. *Dayton Motels, Inc.*, 474 F. 2d 328 (6th Cir. 1973). In *Dayton Motels*, the employer had sought to prove, in defense to a refusal to bargain charge, that the authorizations obtained to secure union recognition more than six months before the charge was filed were obtained by a supervisory employee who had collaborated with the union and that this fact had been fraudulently concealed from the employer. The Sixth Circuit held that Section 10(b) did not preclude this proof (*id.* at 333):

> [T]hese events were admissible as background evidence reflecting on the mental attitude or good-faith doubt of the Company officials that the Union ever represented a majority of its employees. In no way does this constitute an attack on the validity of the expiring agreement or on the presumption [of majority status] created thereby, which attack was barred by Section 10(b) of the Act.

The Sixth Circuit observed that it was permissible "for the Company to show that it discovered, more than one year after the collective bargaining agreement was signed, the

complicity of its supervisor and the concealment by the Union of its misconduct." *Id.* at 334.[8]

In the present case, however, petitioners sought to introduce evidence of the Union's lack of majority support at the time of the Union's initial recognition for the very purpose of attacking the validity of the presumption of continuing majority status (Suppl. App. 2-3, 26-28, 66-69). Moreover, there is no evidence in this case of any fraudulent concealment of misconduct that would lift the six-month restriction of Section 10(b). See *International Ladies' Garment Workers Union* v. *NLRB*, 463 F. 2d 907, 922 (D.C. Cir. 1972).

3. Finally, petitioners are mistaken in their claim (Pet. 7-8, 12-16) that the Board refused to consider the totality of the evidence in determining whether petitioners possessed a reasonably based good-faith doubt of the Union's continuing majority status. Both the Board (Suppl. App. 32, 71-72) and the court (Pet. App. 28) expressly considered the cumulative effect of the claims and justifications advanced by petitioners on this issue. The Administrative Law Judge, whose findings on the evidence were adopted by the Board, noted that the question whether an employer has a "reasonably based doubt as to a union's continued majority cannot be resolved by the application of any mechanical formulas and can only be answered 'in the light of the totality of all circumstances involved in a particular case.' *Celanese Corporation of America*, 95 NLRB 664" (Suppl. App. 32).[9]

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[8]After the remand to the Board in *Dayton Motels*, the Board found that "although the union's original majority in 1967 was tainted by the prounion activities of a female supervisor, that conduct 'in no way entered into respondent's decision in June 1970 to withdraw recognition from the union and refuse to bargain with it.' " 525 F. 2d 476, 477 (6th Cir. 1975). The court of appeals then enforced the Board's order. 415 F. 2d at 659 n.7.

[9]Petitioners agree (Pet. 12) that the *Celanese* case establishes the correct rule.

Petitioners' claim is thus, in substance, only a disagreement with the Board as to the factual conclusions to be drawn from the evidence.[10] A claim that the Board's findings are not supported by substantial evidence does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, there is ample evidence to support the Board's finding in this case. See note 4, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Contrary to petitioners' claim (Pet. 19-20), the court did not fail to address its assertion that the Union in fact did not represent a majority. The court stated (Pet. App. 3, n.6): "Evidence to show the Union was actually in the minority was also offered; but the evidence was clearly insufficient and therefore will not be discussed." See also Suppl. App. 30-31, 69-71.

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